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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-335

OPPENHEIMER FUND, INC., OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY, JACK NASH, EDMUND T. DELANEY and EMANUEL CELLER,

Petitioners,

v.

IRVING SANDERS, EGON TAUSSIG, MICHAEL SHAEV and RITA SHAEV,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Shapiro v. *Merrill Lynch*, 70 Civ. 3653 (S.D.N.Y., July 11, 1974) 21 n.14

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State of Illinois v. *Harper & Row Publishers*, 301 F. Supp. 484 (N.D. Ill. 1969) 25 n.19, 31 n.23

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief is submitted in opposition to the petition by the defendants for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on June 22, 1977 which, after rehearing en banc, affirmed the order of the United States District Court for the Southern District of New York, which determined, among other things, that under the facts and circumstances of this case, defendant Oppenheimer Fund, Inc. (the "Fund") should bear the cost of culling out the names and addresses of the class members from the Fund's computer tapes. The Court of Appeals held, on the basis of the record in this case, that the District Court did not abuse its discretion in entering said order.

Question Presented

Did the District Court, based upon the record in this case, abuse its discretion in requiring the Fund to bear the cost of culling out the names and addresses of class members from its computer tapes?

Statement of the Case

A. *The Pleadings*

This consolidated action was brought by plaintiffs representatively on behalf of themselves and other persons similarly situated who purchased shares of the Fund subsequent to March 15, 1968 and derivatively on behalf of the Fund, which is an open-ended investment fund registered under the Investment Company Act of 1940 with net assets in excess of $500,000,000. These consolidated actions, which are based upon alleged violations of the Securities Act of 1933 (15 U.S.C. Section 77a *et seq.*), the Securities Exchange Act of 1934 (15 U.S.C. Section 78a *et seq.*) and the Investment Company Act of 1940 (15 U.S.C. Section 80(a) *et seq.*), and various rules promulgated thereunder, are brought against defendant Oppenheimer Management Corporation (the "Manager"), which is the investment advisor to the Fund and the general distributor of its shares; defendant Oppenheimer & Co., which owns all of the voting stock of the Manager, and the individual defendants, who are directors of the Fund. Some of the individual defendants are also officers of the Fund, officers and directors of the Manager and/or partners in Oppenheimer & Co.

The complaints in these consolidated actions allege, in substance, that the defendants caused the Fund to issue prospectuses and reports that were false and misleading,

in that, among other things, they failed to state that the Fund would purchase "restricted" securities, and failed to describe the risks involved in such purchases. The complaints further allege, in substance, that the defendants caused the Fund to value improperly the restricted securities in the Fund's portfolio, thereby overstating the net asset value of shares of the Fund which were sold to the public, that the defendants caused the Fund to issue prospectuses and reports which were falses and misleading in failing to disclose material information relating to the improper valuation of restricted securities in the Fund's portfolio, that the aforesaid conduct constituted a breach of fiduciary duties to the plaintiffs and the class and that, as a result of the foregoing, persons who purchased shares of the Fund subsequent to March 15, 1968 were caused to pay false and inflated prices for their shares of the Fund. The complaints further allege that, as a result of said improper valuation of restricted securities, the Fund was caused to pay the Manager excessive fees under its management agreement and to redeem shares at inflated prices. The plaintiffs seek to recover damages on behalf of the members of the class who paid excessive prices for their shares of the Fund;[1] and derivatively, on behalf of the Fund, to recover any damages sustained by the Fund and the profits made by the other defendants, including the excessive fees paid to the Manager.

The defendants have served amended answers denying any wrongdoing and asserting various affirmative defenses; including an alleged set-off against those members of the class who redeemed shares of the Fund since March 1968, for allegedly excessive amounts as a result of the overvaluation of restricted securities in the portfolio of the

[1] The total aggregate damages suffered by the class has been estimated to be in the area of $1,500,000.

Fund. In addition, the defendants other than the Fund have asserted in their amended answers that, if they are liable to the class by reason of the overvaluation of restricted securities in the portfolio of the Fund, then the Fund is liable to them to the extent that the Fund has received funds from plaintiff and members of the class by reason of such overvaluation.[2]

B. *Prior Proceedings*

The three consclidated actions were commenced March 26, 1969, May 12, 1969 and June 18, 1969, respectively, and were consolidated for all purposes by order of the Court dated December 17, 1969. Thereafter, the plaintiffs conducted extensive discovery proceedings, some of which, as indicated below, related to the identification of class members and the method and cost of sending notice to the class, including the service of two sets of interrogatories, the examination of numerous documents and the oral examination of several officers and directors of the Fund and the Manager and the deposition of the Fund's transfer agent.

C. *The Class Action Motion*

On March 30, 1973, plaintiffs moved for an order pursuant to Rule 23(c)(1) of the F.R.Civ.P. declaring that this consolidated action may be maintained as a class action on behalf of all persons who purchased shares of the Fund during the period March 28, 1968 to April 24, 1970 (hereinafter referred to as "the class period"). In support of

[2] The assertion by the defendants (page 21) that the Fund is "devoid of any financial interest in the litigation", is clearly erroneous. It is evident from the amended answers of the defendants that they are seeking to hold the Fund liable to them to the extent that they are held liable to the class, by reason of the overvaluation of restricted securities in the portfolio of the Fund.

their motion for a class action determination, plaintiffs set forth information showing that the requirements for a class action under Rule 23(a) and (b)(3) of the F.R.Civ.P. were met.

Following the submission of the class action motion in March 1973 (and after the Court of Appeals for the Second Circuit rendered its decision in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005 (2d Cir. 1973) ("Eisen III"), the plaintiffs, with the approval of the Court, conducted some discovery (principally the deposition of the Fund's transfer agent) to obtain additional information relating to the composition of the class, the identification of class members and the method and cost of sending notice to the class. The defendants did not object to the proposed discovery, notwithstanding the fact that defendants stated that it would require the Fund's transfer agent to "assemble and compile information and statistical data," except that the defendants argued that the discovery should be conducted by the use of written interrogatories, unless the plaintiffs paid, in the first instance, and subject to ultimate taxation of costs, the expenses of attendance of an attorney for each of the defendants at the place where the deposition was to be taken (Boston, Massachusetts), including reasonable attorneys' fee to be fixed by the Court. The District Court, however, denied the defendants' application to require the discovery to be conducted by the use of written interrogatories and also denied the defendants' application to require the plaintiffs to pay, in the first instance, the expenses of attendance of an attorney for each of the defendants at the deposition.

Thereafter, the deposition of the Fund's transfer agent, pursuant to the Federal Rules of Civil Procedure, was taken, and the discovery disclosed the following information:

1. There were approximately 121,000 persons who purchased shares of the Fund during the class period;

2. The Fund currently had approximately 171,000 shareholders, of whom approximately 103,000 purchased shares of the Fund during the class period;

3. There were approximately 18,000 persons who purchased shares during the class period and were no longer shareholders of the Fund;

4. The names and addresses of the persons who purchased shares of the Fund during the class period could be culled out from the computer tapes of the Fund along with information indicating which of these persons were still shareholders of the Fund and which were not;

5. The cost of culling out the aforementioned information with respect to the names and addresses of class members, which would involve the use and programming of computers, would be approximately $16,000;

6. There would be a charge of $0.01 per insert in connection with inserting the notice to class members in a regular mailing by the Fund to its shareholders.

In December 1973, after the foregoing information had been obtained, plaintiffs, in an affidavit submitted to the Court, modified their application relating to the definition of the class and requested that this action be maintained as a class action on behalf of all persons who purchased shares of the Fund during the class period, and who, like the plaintiffs, were still stockholders of the Fund. This modification, it was noted, would simplify the issues in the case by eliminating, at least in part, the defense asserted by defendants in their amended answers, to the effect that

defendants were entitled to a set-off against those persons who purchased shares in the class period but thereafter redeemed their shares for allegedly excessive amounts as a result of the overvaluation of restricted securities in the Fund's portfolio; it would facilitate the distribution of any recovery to the class and, most importantly, as explained below, it would obviate the need for culling out the names and addresses of the class members and would thus reduce the expenses involved in connection with the further prosecution of the case as a class action.

The definition of the class sought by plaintiffs would have obviated the need for culling out the names and addresses of the members of the class from the Fund's computer tapes in order to give notice to the class, since, if all of the members of the class were current shareholders of the Fund, the class notice could then be enclosed in a regular mailing by the Fund to all of its shareholders, which would include all the class members. Thus, the method of giving notice proposed by the plaintiffs would have provided for actual individual notice by mail to all members of the class apprising them of the pendency of the action and of their right to request exclusion from the class pursuant to the provisions of Rule 23. Furthermore, since the proposed class was defined by the plaintiffs with precision (all persons who purchased shares of the Fund during the class period and were still shareholders of the Fund on a specified date prior to the mailing of the class notice), there would be no problem in entering a judgment in the action, whether favorable or not to the class pursuant to Rule 23(c)(3), describing the persons who were bound by the judgment.[3]

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[3] In the event of a recovery in the action, the names and addresses of class members would, of course, be ascertained in connection with the distribution of the recovery.

Plaintiffs stated that they would pay for the costs of preparing the necessary notices and would pay for any extra costs involved in mailing the class notice in the manner proposed by them, including the cost of inserting the notice in a regular mailing by the Fund to all its current stockholders. It was estimated that these costs, which the plaintiffs were prepared to pay, would be approximately $5,000. If it were necessary, however, to ascertain the names and addresses of the class members in order to give notice to the class, the total costs involved in connection with giving notice would be in excess of $20,000. The plaintiffs indicated that, if they were required to pay at that time the costs of identifying the class members as well as the costs of sending notice to the class, they would not continue prosecution of the action as a class suit.

The defendants opposed the definition of the class sought by plaintiffs which limited the class to persons who were still stockholders of the Fund, presumably because it would limit the *res judicata* effect of this action.[4] Defendants also objected to the distribution of the class notice in the manner proposed by the plaintiffs (by directing the notice specifically to those shareholders of the Fund who purchased during the class period and enclosing the notice in a regular mailing of the Fund to all of its 171,000 shareholders), claiming that this method would result in the notice being received by approximately 68,000 shareholders

[4] Since, at the same time, the defendants themselves sought to limit the class to persons who purchased shares of the Fund prior to April 25, 1969, it may well be that, in seeking to have the class defined so as to include persons who were no longer shareholders of the Fund (which would make it necessary to ascertain the names and addresses of the class members in order to give notice to all members of the class), the defendants were principally interested in increasing the expenses involved in connection with giving notice to the class in the hope that the district court would impose these added expenses upon the plaintiffs and that this would prevent the action from proceeding as a class suit.

of the Fund who were not members of the class, and that this would somehow have an adverse effect on the Fund, including allegedly precipitating a flood of redemptions by these shareholders. In response to defendants' objections, plaintiffs pointed out that, since 1970, the Fund had apprised its shareholders in its proxies, prospectuses and annual reports, no fewer than 13 times, of the pendency of this action, and the nature of the claims alleged herein, and of the fact that, in the opinion of their counsel, and counsel for the Manager, the suits have "no legal merit." Plaintiffs contended that the defendants had not made an adequate showing to support their claims of alleged harm, and that defendants' claims were motivated by a desire to maximize the costs involved in an effort to prevent the action from proceeding as a class suit, and that defendants had not raised any valid objections to the method of giving notice proposed by the plaintiffs.

All of the issues raised by plaintiffs' motion for a class action determination were fully explored and briefed by the parties and were carefully considered by the District Court prior to its decisions on the motion. On several occasions, the Court requested additional information and briefing with respect to various matters, including the definition of the class, the appropriate method of giving notice to the class in this case, the effect of the decision in *Eisen III*, and the appropriate allocation in this case of the cost of culling out a list of class members from the Fund's computer tapes under the discovery rules and in light of all the facts and circumstances in the case.

Decision and Memorandum Order of the District Court

On May 15, 1975, the District Court rendered a decision determining that this consolidated action may be maintained as a class action under Rule 23(b)(3) of the F.R. Civ.P. on behalf of all persons who purchased shares of the Fund between March 15, 1968[5] and April 24, 1970.[6]

With respect to the definition of the class, the method of giving notice to the class and the allocation of the costs of culling out from the Fund's computer tapes the names and addresses of the class members, the District Court rendered a decision which took into account the respective positions and proposals urged by the parties with respect to these matters, and constituted the Court's considered judgment as to what would be a fair overall disposition of the matter, based upon the particular facts and circumstances in this case. The Court agreed to define the class as requested by the defendants to include those persons who were no longer shareholders of the Fund and agreed to defendants' related request that notice not be sent out in the manner proposed by the plaintiffs by including the notice in a regular mailing to all current shareholders of the Fund, thereby necessitating the identification of the specific names and addresses of class members in order to send notice to the class. With regard to the matter of culling out the names and addresses of the class members from the Fund's computer tapes, the Court determined that it would be appropriate, on the basis of the facts and

[5] The starting date of the class period was modified in Judge Griesa's memorandum order of September 30, 1975, on consent of the parties, to March 28, 1968.

[6] The Court rejected the defendants' claim that the class should be limited to persons who purchased prior to April 25, 1969.

circumstances of this case, that this expense, which was necessitated by the defendants' requests with regard to the definition of the class and the method of giving notice to the class, be the responsibility of the defendants, and the Court indicated that the Fund should bear the cost of culling out from its computer tapes the names and addresses of the class members in this case. In reaching this decision, the District Court stated:

> "Whether this would be the correct allocation in other cases, I do not attempt to say. But here the expense is relatively modest and it is the defendants who are seeking to have the class defined in a manner which appears to require the additional expense." (6a)[7]

The District Court further determined that the plaintiffs would be responsible for preparing and mailing the necessary notices to the members of the class at their expense.

After all parties moved for reargument, the District Court, in a memorandum order dated September 30, 1975, denied essentially all of the motions for reargument. The District Court indicated in its memorandum order that the cost of culling out the list of class members shall be borne by the Fund without prejudice to the right of this defendant at the conclusion of the action to make whatever claim it would be legally entitled to make regarding reimbursement by another party;[8] and that, as to the mailing of

[7] References are to pages of Petitioners' Appendix.

[8] In its motion for reargument, the Fund had requested the Court to clarify its ruling as to which of the defendants are to bear the cost of culling out the names and addresses and, that, if the Court required the Fund to bear such cost, its ruling should set forth that the payment at this time is an advance and that there has been no determination of the question of contribution. It may be noted that the District Court had, in fact, already indicated, in its decision of May 15, 1975, that the Fund was to be responsible for this cost. The Manager, in its motion for reargu-

notices, plaintiffs are to have the option of: (a) sending them out in their own mailing, or (b) including them in a regular mailing of the Fund, provided that the notices are sent only to class members and that plaintiffs pay in full the Fund's extra cost of mailing, including the cost of segregating the envelopes going to the class members from the envelopes going to other Fund shareholders.

The Panel Decision

On June 30, 1976, a three judge panel of the Court of Appeals[9] determined that the granting of class action status was proper. A majority of the panel (Judge Hays dissenting) determined, however, that the order of the District Court directing the Fund to bear the cost of culling out the names and addresses of class members from the Fund's computer tapes should be reversed.

The Court of Appeals En Banc Decision

On September 14, 1976 the Court of Appeals granted the plaintiff's petition for a rehearing *en banc* with respect to the question of whether the District Court had committed reversible error in directing the Fund to bear the cost of culling out the names and addresses of the class members from the Fund's computer tapes.

On rehearing *en banc,* the Court of Appeals[10] (Mulligan, Van Graafeiland and Meskill, *JJ,* dissenting) affirmed the

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ment, asserted that, "[i]f the defendants are to bear the cost of preparing lists, such cost should be advanced in the first instance by the Fund, as provided in the Court's opinion (at p. 2)."

[9] The panel consisted of Circuit Judges Hays and Mulligan and District Judge Palmieri sitting by designation.

[10] The *en banc* court consisted of Chief Judge Kaufman and Circuit Judges Hays, Feinberg, Mansfield, Mulligan, Oakes, Timbers, Gurfein, Van Graafeiland and Meskill.

order of the District Court directing the Fund to bear the expenses of culling out the names and addresses of class members from the Fund's computer tapes.

The Court of Appeals stated that the information sought by plaintiffs as to the names and addresses of the members of the class was within the broad scope of permissible discovery established by the Federal Rules, and that Rule 34 which is specifically applicable to the discovery of computerized information provided an ample basis for the District Court's order directing the Fund to produce from its computerized records the discoverable information concerning the names and addresses of class members. The Court of Appeals further stated that while the District Court has discretion under Rule 34 coupled with Rule 26 (c) of the Federal Rules to shift the cost of discovery of computerized information to the discovering party where the demand for information would impose upon the respondent "undue burden or expense", the District Court did not abuse its discretion in declining to do so in the instant case, based upon the facts and circumstances in this case. In reaching this conclusion, the Court of Appeals indicated that although compliance with the District Court's order involved an expenditure by the Fund of approximately $16,000, the Court of Appeals could not say that the burden thus imposed was unreasonable in light of the nature of the information sought and the extent and character of the Fund's business operations. The Court of Appeals also stated that the order of the District Court allocating the cost of discovery of the computerized names and addresses of the class members was not unreasonable in light of the District Court's definition of the class. The Court of Appeals noted that the cost of discovering the names and addresses of the class members was occasioned by the District Court's agreement to define the class as sought by the defendants.

In conclusion, the Court of Appeals stated:

> "... we are not disposed to hold that the district court's refusal to impose on plaintiffs the cost of discovery of the computerized names and addresses was an abuse of discretion. Indeed, the order of the district court accommodated the competing interests in a manner which was fair and imaginative."[11] (46a)

Reasons for Denying the Writ

1. The issue in the instant case is whether the District Court, based upon the facts and circumstances in this case abused its discretion in directing the Fund to bear the cost of culling out the names and addresses of class members from its computer tapes. While the resolution of this issue is of significance to the parties, it does not involve "principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). The facts and circumstances in this case are peculiar to this case and are not likely to recur. Accordingly, review by this Court is not warranted. *United States* v. *Shannon*, 342 U.S. 288 (1952) (concurring opinion of Mr. Justice Frankfurter).

In a vain attempt to bolster their position, defendants erroneously suggest that the decision by the Court of Appeals below will "require" not only defendants, but also non-parties, such as brokerage houses, to bear the expense of providing information as to the names and addresses of class members. (Defendants' Petition, p. 24) First of

[11] The Court of Appeals noted that its affirmance of the District Court's order was without prejudice to a claim by the defendant Fund for discretionary taxation of the cost of discovery against plaintiffs, should the plaintiffs ultimately lose.

all, the decision by the Court of Appeals affirming the District Court's discretionary determination on the basis of the record in this case does not "require" a district court in another case involving different facts and circumstances to determine that the defendant should bear the cost of providing the information as to the names and addresses of class members. Furthermore, as indicated by the Court of Appeals in *In re Penn Central Securities Litigation*, No. 76-2139 (3rd Cir. Aug. 5, 1977), *reversing* 416 F. Supp. 907 (E.D. Pa. 1976), the decision by the Court of Appeals below did not pass upon the various issues involved in the *Penn Central* case or the other cases cited by defendants on page 24 of their petition, concerning the obligations of brokerage houses who hold shares for their customers in street name to provide information as to the identity of their customers and/or to mail the notice to said customers.

2. The decision by the Court of Appeals below does not conflict with the decision by the Fifth Circuit in *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977), as contended by defendants. In *Nissan*, the Court, after noting that its "review of the class action issues raised in this appeal is limited to whether the district court abused its discretion," (552 F.2d at 1096), considered the particular facts and circumstances involved in the case, and on the basis thereof, the Court determined that plaintiffs should be required at their expense to compile a list of the names and addresses of the class members from the defendants' business records. The Court did not base its determination on any hard-and-fast rule as to which party should bear the expense of obtaining information with respect to the names and addresses of class members. Indeed, the Court noted that "[e]xamination of the decisions treating this question reveals that ... both plain-

tiffs and defendants have been ordered to compile information necessary to the identification of absentee class members," and that, in almost all of these cases, the district courts had appeared to have adopted a "rule of reason" approach involving the determination of which of the parties would have the easier task of gathering the information sought (552 F.2d at 1101). Furthermore, while indicating that in their opinion the discovery rules should not "control the question's final resolution," the Court in *Nissan* stated that "the spirit of those rules and the decisional law developed under them may offer guidance in resolving which party should furnish absentee class members' names and addresses" (552 F.2d at 1102). It is, thus, apparent that the decision in *Nissan* requiring the plaintiffs to bear the expense of compiling a list of the names and addresses of class members is based upon the particular facts involved in that case.

The facts and circumstances in *Nissan,* however, are quite different from those in the instant case. For example, in *Nissan* the information as to the names and addresses of class members was not contained in computer tapes, as in the instant case, but rather in the defendants' ordinary business records. Indeed, in reaching its decision, the Court in *Nissan* carefully distinguished the decision in *Foster* v. *Maryland State Sav. and Loan Ass'n.,* 1974-2 CCH Trade Cases ¶ 75,277 (D.D.C. 1974), where the defendant was required to bear the cost of providing the names and addresses of class members on the ground that, in *Foster,* the names and addresses of the class members were contained in the defendant's computer tapes. Furthermore, in *Nissan,* unlike the instant case, the defendants had not sought to have the class defined in a manner that necessitated the expense of obtaining information as to the specific names and addresses of class members.

We respectfully submit that the fact that the Court of Appeals below determined, on the basis of the facts and circumstances in this case, that the District Court had not abused its discretion in requiring the defendant Fund to bear the cost of culling out the names and addresses of class members from its computer tapes, while the Court in *Nissan,* in deciding whether the district court there had abused its discretion, based on a significantly different set of facts and circumstances, determined that the plaintiffs should bear the cost of compiling a list of the names and addresses of class members from the defendants' business records, does not constitute "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." (*Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393 (1923). This Court has dismissed a writ of certiorari as improvidently granted when it appeared that the asserted conflict in decisions arose "from differences in states of fact and not in the application of a principle of law." (*Wisconsin Electric Co.* v. *Dumore Co.,* 282 U.S. 813 (1931)).

3. The decision by the Court of Appeals below does not conflict with the decision by this Court in *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974) ("Eisen IV"). As shown more fully in the Argument below, this Court did not hold in *Eisen IV* that information as to the names and addresses of class members may not be obtained through discovery or that the cost of discovering or obtaining this information must be borne in each case by the plaintiff as part of his obligation to bear the cost of printing and mailing the notice to the class. In this connection, it may be noted that none of the cases cited by the defendants in their petition has held that the plaintiff must bear the cost of obtaining information as to the names and addresses of class members on the ground that *Eisen IV* requires the plaintiff to

bear these costs in each case. On the contrary, as shown in the Argument below, in all of these cases, the question of whether the cost of discovering or obtaining information as to the names and addresses of class members should be borne by the plaintiff or the defendant has been determined on the basis of the particular facts and circumstances in each case. The defendants' contention that the decision below, holding that the District Court, based upon the peculiar facts and circumstances in this case, did not abuse its discretion in directing the Fund to bear the cost of culling out the names and addresses of class members from its computer tapes, is in conflict with the decision by this Court in *Eisen IV*, is, we respectfully submit, totally unfounded.

4. It is well settled that the district courts have broad discretion in dealing with discovery matters, and that discretionary judgments of the district court should not be disturbed absent an abuse of discretion. In the instant case, the Court below determined that the District Court had not abused its discretion. This Court has traditionally declined to review cases involving such discretionary determinations. *Moor* v. *Texas & N.O.R. Co.*, 297 U.S. 101, 105 (1936); *Cf. National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951).

5. As shown in the Argument below, the decision by the Court of Appeals is well supported by the record in this case and by applicable authorities.

ARGUMENT

The District Court Did Not Abuse Its Discretion, Based Upon the Record in This Case, in Requiring the Fund to Bear the Expense of Culling Out the Names of Class Members From Its Computer Tapes.

Information as to the names and addresses of class members is relevant to the subject matter of a class action and may be obtained under the discovery rules. As the Court below stated:

> "It hardly requires our extended discussion to establish that the information sought by plaintiffs as to the names and addresses of the members of the class is indeed within the broad scope of permissible discovery established by our Federal Rules. Under Rule 26, '[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . .' Fed. R. Civ. P. 26(b)(1). The holding of *Eisen IV* itself propels us ineluctably to the conclusion that the names and addresses of class members are 'relevant to the subject matter' of a class action. By mandating that a representative plaintiff in a class suit send individualized notice to the members of his class, *Eisen* raises as a potential issue in all such litigation whether the required notice has properly been sent. A list of the names and addresses of the class members would of course be essential to the resolution of that issue. *See Appleton Electric Co.* v. *Advance United Expressways*, 494 F.2d 126, 138 (7th Cir. 1974); *Brennan* v. *Midwestern United Life Ins. Co.*, 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972)."[12] (40a)

[12] *See also, Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947) where this Court indicated that the discovery rules "are to be accorded

. The defendants contend that information as to the names and addresses of class members may not be obtained pursuant to the discovery rules. Defendants argue that discovery of information relating to the identification of class members must be distinguished from discovery of information generally, presumably because the former relates to class action requirements in the case. Carried to its logical conclusion, the defendants would make the discovery rules inapplicable to other matters (in addition to the identification of class members) that are germane to the requirements for maintaining a suit as a class action under Rule 23, such as the description of the class, the number of class members, etc.[13] Indeed, the defendants appear to

a broad and liberal treatment"; *Burstein* v. *Slote*, 12 F.R.Serv.2d 577, 580 (S.D.N.Y. 1968); and *Chevalier* v. *Baird Sav. Ass'n*, 72 F.R.D. 140, 148 (E.D. Pa. 1976).

In *Burstein* v. *Slote, supra*, the Court said:

> *"In view of the mandatory notice requirements of Rule 23(c)(2)* (once an action is judicially determined to be maintainable as a class suit), and no indication present that plaintiffs are abusing the discovery rules so as to harass defendants, *plaintiffs are permitted to inquire of defendants on oral examination as to the names of the purchasers of securities of Manufacturers Credit Corp. and its related entities . . ."*
>
> "Plaintiffs, of course, may not use this information to notify other members of the putative class of the pendency of these actions unless and until they are denominated class actions by court order." (Emphasis supplied.) 12 F.R.Serv.2d at 580.

In *Chevalier* v. *Baird Savings Assoc., supra*, the Court stated:

> ". . . we agree with plaintiffs that the names of the class members are discoverable. Quite clearly they fall within the ambit of rules 34 and 26(b) of the Federal Rules of Civil Procedure. And since the cost of identification would be fairly nominal for the defendants (approximately $14,500 spread over 22 banks) we are inclined to think that we would not enter a protective order, or require plaintiffs to reimburse defendants for the costs of collecting this information."

[13] If this were the case, plaintiffs might find it impossible to demonstrate to the Court that the various requirements of Rule 23 had been satisfied.

argue that information that has "nothing whatsoever to do with the merits of plaintiffs' claims of wrongdoing," even though it bears upon the requirements of maintaining the action as a class suit, is outside the scope of discovery (Defendants' Petition, pp. 18-19). This contention is, however, clearly unsound and unfounded in either the federal rules or in case law.[14]

The defendants also make the rather disingenuous argument that, while information as to the names and addresses of class members may be relevant in determining whether the requirement of Rule 23(c)(2) that individual notice be sent to all members of the class who can be identified through reasonable effort has been satisfied, the fact that this issue has not yet been presented to the Court for adjudication makes said information irrelevant to the subject matter of this class action. It is evident, however, that information that is otherwise relevant to the subject matter of the action, and thus, within the permissible scope of discovery, is not rendered irrelevant and outside the scope of discovery, as defendants urge, simply because, the issue with respect to which the information relates has not yet been presented to the Court for adjudication.[15] Defendants' assertion (at page 26 of their petition) that "if this action proceeds as a class action, proper notification will not be an issue in this case, since all of the members of the class can be identified and notice can be mailed to each member," simply begs the question. The issue of whether

[14] See cases cited, *supra*, pages 19-20. See also *Branch* v. *Reynolds Metals Co.*, 17 F.R. Serv.2d 494 (E.D. Va. 1972); *Dickerson* v. *United States Steel Corp.*, 18 F.R. Serv.2d 554 (E.D. Pa. 1974); *Shapiro* v. *Merrill Lynch*, 70 Civ. 3653 (S.D.N.Y. July 11, 1974) (unreported decision).

[15] It is well recognized that information sought to be discovered need not even be relevant to the "issues" in the case and that "relevancy to the subject matter is all that is required". 8 Wright & Miller, Federal Practice & Procedure §2008 at 41-42.

the requirements of Rule 23(c)(2) have been satisfied depends upon information with respect to the names and addresses of the class members that is contained in the Fund's computer tapes and, thus, this information is clearly relevant to the subject matter of this action.

The fact that Rule 23(c)(2) provides that "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," does not, as defendants contend, indicate that the identification of class members is not subject to discovery. If this were true simply because the identification of class members is referred to in the same paragraph of Rule 23(c)(2) as the provisions for giving notice to the class, it would also follow that information relating to whether the members of the class "can be identified through reasonable effort" or what is "the best notice practicable under the circumstances," which are also referred to in the same paragraph of Rule 23(c)(2), would not be obtainable through discovery. Yet, in this very case, discovery was permitted by the District Court, without objection by the defendants, with respect to these matters and other matters relating to the method and cost of sending notice to the class. If such information may be obtained through discovery, there is no logical basis for the contention that information relating to the names and addresses of class members is not subject to discovery; and the courts have specifically recognized, as indicated above, that, because of the mandatory notice requirements of Rule 23(c)(2), a plaintiff should be allowed to obtain information pursuant to the discovery rules as to the names of class members.

It is also suggested by the defendants that, since the information as to the names and addresses of class members

is sought solely for the purpose of enabling plaintiffs to fulfill their obligations under Rule 23, (and, in particular here, the requirements under Rule 23(c)(2), that individual notice be mailed to all members of the class who can be identified through reasonable effort) the cost of discovering such information should be borne by the plaintiffs. The defendants assert (p. 19) that all costs "solely attributable to instituting a class suit," (which would presumably include the cost of all discovery relating to the class action requirements under Rule 23), should be borne by the plaintiffs and that the district courts, in allocating the expenses of discovery, should be required to differentiate between information that is relevant only to the class action requirements of the case and information that is relevant to the merits generally. No such distinction is dictated by Rule 23, by the federal discovery rules or by *Eisen IV*. In *Eisen IV*, this Court held that the costs of printing and mailing the notice are in the usual case the responsibility of the plaintiff "as part of the ordinary burden of financing his own suit." *Eisen IV, supra*, at 179. The expenses involved in the discovery of information, however, have not been automatically regarded as part of the ordinary burden of a party of financing his own suit, but rather the allocation of such expenses has traditionally rested within the sound discretion of the district courts. *Eisen IV*, which did not even deal with the question of obtaining information as to the names of class members, did not hold that all "costs attributable to instituting a class suit," including the costs of discovering or obtaining information relating to the class action requirements, must be borne by the plaintiff in each case, notwithstanding the well-settled rule that the allocation of these expenses should rest in the sound discretion of the district court.[16] Matters pertain-

[16] We agree with defendants' assertion that this Court in *Eisen IV* did not intend to distinguish between "class actions and other

ing to discovery of information, whether they relate to class action matters, as in the instant case, or to the merits of the case, have been left to the sound discretion of district courts; and the district courts' determinations with respect to the allocation of discovery expenses have been disturbed only upon a showing that there has been abuse of discretion.[17]

The defendants' contention that a substantial majority of the relevant cases have made no distinction between the costs of printing and mailing the notice and the costs involved in obtaining information as to the names and addresses of class members, is totally unfounded. In the cases referred to by defendants (Defendants' petition, p. 15, fn.17), the question of whether the cost of discover-

forms of adversary proceedings". (Defendant's petition page 19.) Yet, this is precisely what defendants urge this Court to do by seeking to have this Court distinguish between the discovery of information that is relevant to the subject matter of a class action and the discovery of information in other forms of adversary proceedings.

[17] The assertion by the defendants that the decision below is improper because it forces the defendants to subsidize the suit against them, is without merit. A defendant in any law suit, whether it be a class action or not, is frequently required to bear substantial expenses in connection with discovery conducted by the plaintiff. Thus, it could be argued in any case that whenever a defendant is required to bear the cost of providing information to the plaintiff in connection with discovery, which information may be used by the plaintiff in prosecuting his suit, that the defendant has been forced to subsidize the suit against himself. It is well settled, however, that it is not improper, per se, for a defendant to be required to bear such expenses. The issue is, rather, whether compliance with the discovery demand would impose upon the defendant "undue burden or expense." The determination of this issue rests within the sound discretion of the district court. *Baker* v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *H.L. Moore Drug Exchange, Inc.* v. *Smith, Kline & French Laboratories*, 384 F.2d 97 (2d Cir. 1967); *Harvey* v. *Eimco Corp.*, 28 F.R.D. 381 (E.D. Pa. 1961).

ing or obtaining information as to the names and addresses of class members should be borne by the plaintiffs or the defendants was determined by the court on the basis of the particular facts and circumstances in each case, notwithstanding the fact that *Eisen IV* requires the plaintiff to bear the cost of printing and mailing the notice. If the cost involved in discovering or obtaining information as to the names and addresses of class members had been simply regarded in these cases as part of the cost of printing and mailing the notice, as defendants urge, then these decisions would not have turned upon the particular facts and circumstances in each case, as they do, nor would they have resulted in the costs being borne by the defendants[18] in some cases and the plaintiffs[19] in others. None of the

[18] *E.g., Foster* v. *Maryland State Sav. & Loan Ass'n, supra; Chevalier* v. *Baird Sav. Ass'n., supra; Richardson* v. *Hamilton International Corp.*, 62 F.R.D. 413 (E.D.Pa. 1974); *Hawkins* v. *Holiday Inns, Inc.*, 1975-1 CCH Trade Cases ¶ 60,153 (W.D.Tenn. 1975); *City of New York* v. *Darling-Delaware, Inc.*, 1976-1 CCH Trade Cases ¶ 60,812 (S.D.N.Y. 1976); *Herbst* v. *Able*, 47 F.R.D. 11 (S.D.N.Y. 1969); *Berland* v. *Mack*, 48 F.R.D. 121 (S.D.N.Y. 1969). In each of these cases, the information with respect to the names and addresses of class members, as in the instant case, was in the possession of the defendants. In *Foster*, the information was contained in the defendants' computer tapes.

[19] *E.g., In re Nissan Motor Corp. Antitrust Litigation, supra,* (discussed at length, *supra,* at pp. 15-17); *State of Illinois* v. *Harper & Row Publishers,* 301 F.Supp. 484 (N.D.Ill. 1969) (information in possession of plaintiffs); *In re Sugar Industry Antitrust Litigation,* 73 F.R.D. 322 (E.D.Pa. 1976) (information available from public lists or non-party business organizations); *In re Antibiotic Antitrust Actions,* 333 F.Supp. 278 (S.D.N.Y. 1971), (information in possession of plaintiffs or available from non-party sources); *Grad* v. *Memorex Corp.*, 61 F.R.D. 88 (N.D.Cal. 1973) (plaintiff agreed to pay cost of identifying class members).

There is no "clear conflict of authority" in the Eastern District of Pennsylvania as to the question of which party should bear the expense of obtaining information with respect to the names of class members, as erroneously contended by defendants (Deft's. Pet., pp. 15, 16, footnote 17). In *Chevalier* v. *Baird Sav. Ass'n., supra,* and *Richardson* v. *Hamilton Int'l. Corp., supra,* the courts

cases cited by the defendants support their contention that in each case, plaintiffs *must* bear the expenses involved in obtaining information as to the names and addresses of class members as part of their obligation under *Eisen IV* to bear the costs of printing and mailing the notice.

It is well recognized, as noted earlier, that the district court has wide discretion in matters of discovery, including the allocation of expenses relating thereto, and that the discretionary judgment of the district court in the realm of discovery should not be disturbed absent a showing of abuse of discretion.[20] (See cases cited, p. 24, footnote 17.) Rule 34 of the Federal Rules, which is specifically applicable to the discovery of computerized information, provides

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determined that the defendants should bear the cost of obtaining information as to the names and addresses of class members from their records based upon the facts in those cases, while in *In re Sugar Industry Antitrust Litigation, supra,* the court determined that the plaintiffs would have to bear the expense of identifying the class members where the information relating thereto was not in the possession of the defendants but rather could be obtained from non-party trade associations and from published lists, and in *B&B Investment Club* v. *Kleinert's, Inc.* [1973-74 Transfer Binder], CCH Fed.Sec.L.Rep. ¶ 94,451 (E.D.Pa. 1974), the court cited with approval the procedure in *Berland* v. *Mack, supra,* where the defendant was required at its expense to furnish to the plaintiffs a list of the names and addresses of the members of the class. Neither *In re Sugar Industry Antitrust Litigation, supra,* nor *B&B Investment Club* v. *Kleinert's, Inc., supra,* holds, as defendants erroneously state: "that the cost of identification was part of the cost of notice which must be borne by the class representatives."

[20] In *Brown* v. *Thompson,* 430 F.2d 1214, 1216 (5th Cir. 1970), the Court, in reviewing a discretionary determination by the district court in a discovery matter, observed:

> "The judges of the Court of Appeals might well feel that under like circumstances they would have exercised the judicial discretion in a manner different from that in which it was exercised by the trial court. But this is not a basis for reversing the determination of the trial court. The test is whether there has been an abuse of that discretion. . . ."

ample foundation for the District Court's order in the instant case requiring the Fund to produce from its computerized records the discoverable information concerning the names and addresses of class members. As noted by the Court of Appeals, the 1970 amendments to the Federal Rules rendered Rule 34 specifically applicable to the discovery of computerized information:

> "The inclusive description of 'documents' is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations, from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a printout of computer data." Advisory Committee Note, 48 F.R.D. 459, 527 (1970). (41a)

It is also well settled, as noted above, that under the discovery rules, parties may be required to furnish information calling for investigation or accumulation of data, even though a considerable burden or expense may be involved. If the information sought is relevant, a responding party, under the federal discovery rules, in order to shift the expense to the other side, must show not only that the request for information is burdensome or expensive but that the burden or expense is so excessive as to be unreasonable or oppressive. Specifically, with regard to the obligation of a responding party under the Federal Rules to provide information that is contained in computer tapes, Professors Wright and Miller state, in their well-known treatise:

"The responding party who is required to prepare a print-out or otherwise make the data reasonably usable for the discovering party must ordinarily bear the expense of doing this. He can shift the cost to the discovering party only on a showing under Rule 26(c) that justice so requires in order to protect himself from 'undue burden or expense.' In many instances the peculiarities of computerized information actually will oblige the disclosing party to engage in fairly sophisticated electronic manipulation and analysis of the data in his computer system." 8 Wright & Miller, Federal Practice and Procedure, § 2218 at 659. (Footnote omitted.)

The Court of Appeals below, while, of course, recognizing that the District Court has discretion under Rule 34 coupled with Rule 26(c) to shift the expense of special computer programming to the discovering party where the demand for information would impose upon the respondent "undue burden or expense," held that the District Court did not abuse its discretion in declining to do so in the instant case, based upon the facts and circumstances in this case.

In reaching this conclusion, which is well supported by the record in this case, the Court of Appeals referred to several factors. First of all, the Court indicated that, although compliance with the District Court's order would require an expenditure by the Fund of approximately $16,000, "we cannot say the burden thus imposed is unreasonable in light of the nature of the information sought and the extent and character of the fund's business operations" (44a).[21] In contending that the Court of Appeals

[21] In reaching this conclusion, the Court of Appeals noted that the cost to the fund (which has net assets in excess of $500,000,000) of identifying the names and addresses of each present or former shareholder who is a member of the class, was only $.13; that computers may occasionally make information more difficult to discover, and that even where a party adapts his computer software strictly in accordance with legitimate business purposes, complex electronic processes may be required to extract information which might have been obtainable through a minimum of effort had different systems been used; and that it was scarcely unreasonable to demand of a respondent that it employ its computer resources to provide discoverable information of a relatively simple nature where, as in the instant case, the respondent Fund makes extensive use of computers in the operation of its business.

should not have given any consideration to these factors, the defendants have totally confused the issue. In concluding that the expense involved was not unreasonable, the Court of Appeals did not, as defendants seem erroneously to suggest, base its determination upon a comparison of the relative resources of the defendant Fund and the plaintiffs. Rather, the Court of Appeals considered whether, in light of the nature of the information sought and the extent and character of the Fund's business operations, the burden of compliance with the discovery demand in this case was excessive.[22] It was clearly not improper for the Court of Appeals to have taken into account the foregoing facts in determining whether the District Court had abused its discretion in this case. Defendants' assertion that the Court of Appeals was precluded from considering these factors in *Eisen IV* is completely unfounded.

As indicated by the Court of Appeals, the order of the District Court allocating the costs of discovery of the

[22] In this connection, the Court of Appeals also observed:

"There is no injustice in requiring one whose business is vast and complex to go to proportionately greater lengths to meet the law's legitimate requirements for disclosure of business-related information than might be expected of one whose business is small and simple. Great corporations, for example, must expend millions to provide to the government information necessary to comply with internal revenue laws; an individual taxpayer may provide the required information at a cost to himself of a mere few dollars." (44a-45a)

computerized names and addresses of the class members was not unreasonable, moreover, in light of the District Court's definition of the class as sought by the defendants.

The plaintiffs had sought to redefine the class to exclude former shareholders of the Fund, which would have obviated the need for culling out the names and addresses of class members from the Fund's computer tapes and would have allowed the individualized notice mandated by *Eisen IV* to be inserted, at small expense, in one of the Fund's regular mailings. The defendants, however, opposed the class redefinition, presumably because it would limit the *res judicata* effect of this action, and defendants also opposed the proposed method of notice, on the ground that the proposed notice to all the Fund's shareholders would allegedly prejudice the Fund by notifying shareholders of the Fund not involved in the litigation.

The District Court agreed to have the class defined and notice given in the manner requested by the defendants, thereby necessitating the added cost of discovering the names and addresses of class members from the Fund's computer tapes, which cost the District Court required the Fund to bear, noting that:

> "[w]hether this would be the correct allocation in other cases, I do not attempt to say but here the expense is relatively modest and it is the defendants who are seeking to have the class defined in a manner which appears to require the additional expense." (6a)

Notwithstanding the foregoing statement by the District Court, the defendants argue that, since the District Court rejected the plaintiffs' proposed redefinition of the class, the District Court, in allocating this added cost of discovery, should not have taken into account the fact that this added cost was attributable to the defendants' re-

quest with regard to the definition of the class. What the defendants clearly ignore is that the District Court's rulings in this case with regard to the definition of the class, the method of giving notice and the allocation of the costs of culling out the names of class members from the Fund's computer tapes were obviously interrelated and reflect the District Court's considered judgment as to a fair overall disposition of this matter, taking into account the respective positions and proposals urged by the parties with respect to these matters. The District Court could have defined the class as proposed by the plaintiffs, consistent with the principles of Rule 23,[23] but determined

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[23] In this connection, the Court of Appeals stated:

> "The considerations advanced by the defendant in opposition to plaintiffs' proposed class redefinition were undoubtedly entitled to some weight; still, they did not *require* the class definition ultimately accepted by the district court. *See Eisen IV*, 417 U.S. at 179 n.16 and *Eisen III*, 479 F.2d at 1023 (Oakes, *J.*, dissenting from denial of rehearing en banc) (raising possibility that class may be divided into subclasses pursuant to Rule 23(c)(4) so as to minimize cost of notice borne by representative plaintiff). *Cf. Eisen III*, 479 F.2d at 1009 n.5 (suggesting that notice may be included in regular mailing by defendant to class members)." (Emphasis supplied by the Court.) (46a)

See also, Dolgow v. *Anderson*, 43 F.R.D. 472, 498 (E.D.N.Y. 1968) (indicating that if notice to those persons who are no longer stockholders of defendant Monsanto would create a problem, "it might be necessary to limit the classes to include only those who could be provided with notice from current Monsanto shareholder lists"); *State of Illinois* v. *Harper & Row Publishers*, 301 F.Supp. 484, 494 (N.D. Ill. 1969) (granting class certification, notwithstanding the fact that "the restriction of the classes' scope appears arbitrary"); and *Zachary* v. *Chase Manhattan Bank*, 52 F.R.D. 532 (S.D.N.Y. 1971); *Dolgow* v. *Anderson, supra*, at 500, and *Popkin* v. *Wheelabrator-Frye* [1974-1975 Transfer Binder], CCH Fed. Sec. L. Rep. ¶ 95,068 (S.D.N.Y. 1975) (approving insertion of notice in a regular mailing by a corporate defendant to its stockholders in order to reduce the cost of giving notice to the class).

With respect to the method of giving notice proposed by the plaintiffs, the Court below also noted in its opinion that "under Rule 23(c)(2) the district court could have supervised the form

instead, in the exercise of its discretion, to grant the defendants' request with regard to the definition of the class and to require defendants to bear the additional discovery expenses involved in defining the class as sought by them. It is evident from a fair reading of the entire opinion of the District Court that the District Court took into account the "partisan demands" of the defendants in deciding upon the definition of the class and in determining to require the Fund to bear the additional expenses involved in culling out the names of class members from its computer tapes.

None of the cases cited by the defendants dealing with the discovery rules (most of which focus on Rule 33, which, as the Court below indicated, unlike Rule 34, "was not especially tailored to the discovery problems posed by contemporary computer technology," (42a) shows that the District Court abused its discretion in this case in refusing to shift the burden of the expense involved in identifying class members from the Fund to the plaintiffs. These cases do not set forth any hard-and-fast rules with regard to the allocation of discovery expenses. Rather, the cases indicate that the matter is to be determined within the discretion of the District Court based upon the facts and circumstances presented by the particular case. In the instant case, as the Court of Appeals observed, "the order of the district court accommodated the competing interests in a manner which was fair and imaginative." (46a)

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of notice included in one of the Fund's regular mailings, so as to avoid undue prejudice to the Fund," and that "[i]n any event the Fund has already notified its shareholders on many occasions of the pendency of this litigation." See also, *Miller* v. *Mackey Int'l, Inc.*, 452 F.2d 424 (5th Cir. 1971), where the Court rejected a claim by the defendant that sending a class notice to the shareholders of the defendant who had already been apprised of the litigation in prospectuses and letters sent by the defendant to them would "seriously injure the financial position" of the corporation.

We respectfully submit that the District Court, based upon the record in this case, did not abuse its discretion in requiring the Fund to bear the cost of culling out the names and addresses of class members from its computer tapes.

We further respectfully submit that this case, which presents a unique set of circumstances that is not likely to recur, does not involve "principles the settlement of which is of importance to the public as distinguished from the parties," nor is there presented here "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals," *Layne & Bowler Corp.* v. *Western Well Works, Inc., supra.* Accordingly, review by this Court of the decision below is not warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the defendants' petition for a writ of certiorari should be denied.

Respectfully submitted,

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